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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO MILLSAP,

Defendant and Appellant.

B160903

(Los Angeles County
Super. Ct. No. BA204833)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia Ann Bigelow, Judge. Affirmed as modified; remanded for resentencing.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Deborah J. Chuang and Erin M. Pitman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Fernando Millsap was sentenced to 50 years to life in prison for first degree murder with the personal and intentional discharge of a firearm and for the benefit of a criminal street gang (Pen. Code,¹ §§ 187, subd. (a), 190, subd. (a), 12022.53, subd. (d), 186.22, subd. (b)(1)). Millsap argues on appeal that (1) the evidence was insufficient to establish his identity as the gunman; (2) the evidence was insufficient to support the true finding on the gang allegation (§ 186.22, subd. (b)(1)); (3) the expert witness testimony concerning gangs was improper and prejudicial; (4) the sentence enhancement under section 12022.53, subdivision (d) violates the merger doctrine and section 654; and (5) the four-year sentence enhancement imposed under section 186.22, subdivision (b)(1) is improper. We remand for further consideration of that enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

Millsap was charged by information with the June 23, 2000 murder of Darryl Cooper (§ 187, subd. (a)) involving the use of a firearm within the meaning of section 12022.5, subdivision (a)(1) and section 12022.53, subdivisions (b) through (d). Millsap was alleged to have murdered Cooper for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, and assist in the gang's criminal conduct. (§ 186.22, subd. (b)(1).)

At trial, Tiffany Ramirez testified that on the day of the murder she, Cooper, and William Jackson had stopped at a liquor store to pick up drinks. While Cooper was in the store, three men arrived and stood at the store entrance — approximately three feet away from Ramirez as she waited in the car. One of the men wore a white shirt beneath a black flannel shirt, black jeans, black shoes, and a black baseball cap. Through the car's side mirror, Ramirez watched as Cooper exited the store, the man in the black cap spoke, and

¹ Unless otherwise indicated, all further references are to the Penal Code.

Cooper responded. The man in the cap then retrieved a gun from his waistband and shot Cooper three times.

On July 12, 2000, Ramirez identified Millsap as the shooter from a photographic lineup of six men. Ramirez was “a hundred percent certain” of the identification. Ramirez was also shown a six-pack photographic lineup that, without her knowledge, included a photograph of Millsap’s fraternal twin brother. Ramirez identified Millsap’s brother as looking like the gunman, but with less hair. She asked the police if they were trying to trick her with this photograph and confirmed that the photograph in the first six-pack — the photograph of Millsap — depicted the shooter.

At trial, Ramirez identified Millsap as the gunman, again with “[a] hundred percent” certainty. Jackson also testified, generally confirming the events as described by Ramirez. Although Jackson did not see the shooting, he had identified Millsap from a photographic lineup as having been present when Cooper was shot. Jackson was unable to identify Millsap in court.

Because of the special allegation, expert and lay witness evidence was received concerning gangs. Jackson and Cooper were members of the East Coast Black Gangster Crips (East Coast). The liquor store where the shooting occurred was in East Coast territory. Millsap was a member or affiliate of a rival gang, the Five Deuce Broadway Gangster Crips (Broadways).

Expert witness and police officer Jerald Ballesteros identified the primary activities of the Broadways as narcotics sales and use, street robberies, carjackings, shootings and murders. Junior members of the Broadways place graffiti, sell and transport drugs, and carry guns for other members. Mid-level members perform the majority of the serious crimes, including shootings, while senior members direct the gang’s activities. Members of the gang enhance their standing within the gang by committing crimes — the more violent and numerous, the higher a member’s standing and respect.

Ballesteros testified that entering another gang's territory challenges that gang and that a member of the Broadways would cross into East Coast territory to "find an East Coast [member] either to fight, shoot, rob." He testified that it would benefit the Broadways for one of its members to shoot and kill an East Coast member within East Coast territory because this would communicate that the Broadways are a serious, "hardcore" gang with the power to enter another gang's territory, commit a shooting, and leave unchallenged. Ballesteros opined that a shooting as described in a hypothetical question based on the facts of the case would have benefited the Broadways. Such a shooting would also have benefited the gunman by demonstrating his commitment to the gang and giving him bragging rights for killing a rival gang member.

The jury convicted Millsap of first degree murder (§§ 187, subd. (a), 189) and found all the special allegations to be true. The trial court sentenced Millsap to 25 years to life in state prison for the murder, a consecutive 25 years to life for the personal and intentional discharge of a firearm causing death (§ 12022.53, subd. (d)), and a concurrent four-year term for committing the murder for the benefit of a gang (§ 186.22, subd. (b)(1)). The court stayed the remaining firearms enhancements pursuant to section 654. Millsap appeals.

DISCUSSION

I. Sufficiency of the Evidence to Establish Millsap's Identity as the Gunman

Millsap asserts that the evidence that he was the gunman is insufficient to support his conviction. In reviewing the sufficiency of the evidence, we "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Witness credibility and the

weight of the evidence are reserved to the trier of fact, and we may not substitute our views for those of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Sufficient evidence supports the jury's finding that Millsap shot Cooper. Only weeks after the murder, Ramirez identified Millsap as the shooter from a photographic lineup with what she termed "a hundred percent" certainty. She differentiated between photographs of Millsap and his fraternal twin brother despite their resemblance, reiterating that Millsap was the gunman. At trial, Ramirez again identified Millsap as the shooter with complete certainty. "In the instant case, 'there is in the record the inescapable fact of in-court eyewitness identification. That alone is sufficient to sustain the conviction.' [Citation.]" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) When the circumstances surrounding the identification and its weight are explored at length at trial — as they were here — an eyewitness identification accepted as true by the trier of fact is binding on the reviewing court. (*Ibid.*) Moreover, Jackson identified Millsap from a photographic lineup as having been present at the murder and corroborated Ramirez's testimony that the shooter wore a black baseball cap.

Millsap attempts to undermine this evidence by impugning the reliability of eyewitness identifications in general, asserting evidentiary inconsistencies, questioning Ramirez's candor and perception, and setting forth his own assessment of how the factors set forth in CALJIC No. 2.92 for proving identity through eyewitness testimony should be applied here. He attacks Ramirez's identification by discussing evidence that his hair was shorter on the day of the murder than in his lineup photograph. He claims that his hair style at the time of the murder resembled that of the closely-cropped or shaved subjects in the other photographic lineup shown to Ramirez, arguing that Ramirez's statement that the shooter looked like Millsap's brother but had more hair casts doubt on the reliability of her identification.

Millsap's contentions are more appropriate for a jury than for an appellate court. Although he acknowledges the standard of review, Millsap's arguments invite this court to reweigh the evidence, re-evaluate the credibility of witnesses, and substitute our own

conclusions for the jury's findings. We recognize the appellate court's responsibility to ensure that the evidence is reasonable, credible, and of solid value, but we may not invade the province of the fact finder. (*People v. Diaz* (1992) 3 Cal.4th 495, 541; *People v. Barnes* (1986) 42 Cal.3d 284, 304-305.)

Ramirez consistently and positively identified Millsap as Cooper's shooter. The testimony of a single witness may support a judgment — even if it is contradicted or partially inconsistent. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.) Inconsistencies between a defendant's appearance and the description given by an identifying witness do not necessarily undermine the identification, for weaknesses and inconsistencies in eyewitness testimony are matters for the jury to evaluate. (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.) Here, the jury evaluated Ramirez's testimony, found it credible, and accepted it as true. We may not reject an eyewitness identification believed by the jury in the absence of evidence of falsity, inherent improbability, or a physical impossibility that the evidence is true. (*People v. Thornton* (1974) 11 Cal.3d 738, 754, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668; *People v. Flores* (1968) 267 Cal.App.2d 452, 457-458; *Allen*, at p. 623.) There is no evidence of falsity, physical impossibility, or inherent improbability here.

Millsap's arguments about the evidence merely expose a conflict in the evidence that was resolved against him by the jury at trial. Evidence may not be deemed insufficient merely because contradictory evidence was also presented. (*People v. Lewis* (2001) 26 Cal.4th 334, 361 [““Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations]””].) The evidence is sufficient to support the jury's finding that Millsap shot Cooper. (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497 [question on appeal is not whether there is a substantial

conflict in the evidence, “but rather whether there is *substantial evidence in favor of the respondent*”; if substantial evidence exists, the judgment must be affirmed].)

II. Challenges to the Evidence Supporting the Gang Enhancement Under Section 186.22, Subdivision (b)(1)

A. Expert Testimony

Expert witness Ballesteros testified to the size, structure, territory, and operation of the Broadways. The prosecutor then asked him how the Broadways would benefit if “the defendant, a Five Deuce Broadway Gangster Crip[], crosses Slauson into East Coast territory with two others, who may or may not be gang members, approaches a liquor store in East Coast Crip territory, and removes a gun and shoots at an individual there.” Ballesteros responded, “By killing an East Coast Crip it shows East Coast, ‘Hey, Broadways aren’t to be messed with. We’re still a hardcore gang. We’re going to come into your house, neighborhood, shoot one of your guys and come out unchallenged.’” The prosecutor asked, “And based on the hypothetical, in your opinion did the defendant’s actions constitute a benefit to the gang in this case?” Ballesteros answered, “Yes.”

Millsap argues that much of this testimony was improper expert opinion as to whether the legal elements of the special allegation were satisfied and that the remainder was inadmissible because it concerned matters within the jurors’ common experience.² We conclude that the testimony was properly admitted.

² Although Millsap did not object to this testimony and therefore arguably has waived any error in its admission (see, e.g., *People v. Valdez* (1997) 58 Cal.App.4th 494, 505), he argues that the trial court had a sua sponte duty to exclude this testimony and that his trial counsel rendered ineffective assistance by failing to object. Because the testimony was properly admitted, we need not address these arguments.

Ballesteros's expert testimony concerning the two gangs and the benefits conferred on the Broadways and its members by a crime such as that presented hypothetically here is appropriate expert testimony regarding matters outside the experience of the ordinary juror. (Evid. Code, § 801, subd. (a) [expert opinion testimony admissible if its subject matter is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"]; *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*) [culture and habits of gangs are proper subject of expert testimony].) As one court has observed, "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which . . . mindless retaliation promotes 'respect'." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 (*Olguin*).)

Expert testimony concerning the benefits to a gang from a particular offense is admissible when a gang allegation is charged. In *Gardeley*, an expert witness opined that an assault described in a hypothetical question based on the facts of the case was "a 'classic' example of gang-related activity" and explained the benefits and motive for such an act. (*Gardeley, supra*, 14 Cal.4th at p. 619.) The Supreme Court approved of such testimony and observed that it allowed the jury to find that the crime was committed for the benefit of a gang and with the intent to promote the gang's criminal conduct. (*Ibid.*) Similarly, in *Olguin*, an expert witness opined in response to a hypothetical question that when a member of one gang recruited a member of a second gang to assist in a retaliation killing, the reputation and stature of the gang to which the recruit belonged would be enhanced by the fact that its members were sought by other gangs for reinforcement. (*Olguin*, 31 Cal.App.4th at p. 1384.) The court ruled that the jury could find the gang allegation to be true based on this testimony. (*Ibid.*)

Contrary to Millsap's contentions, the expert testimony here was proper in scope. Ballesteros did not define any criminal offense. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46 [expert may not define robbery and extortion].) He expressed no view on whether a crime had been committed. (*Id.* at p. 47 & fn. 3 [expert may not opine on whether a crime was committed, but a jury may need expert testimony on an element to

determine whether a crime was committed[.]) Nor did Ballesteros improperly opine as to Millsap's guilt or innocence. (*Id.* at p. 46.) Expert opinion on whether an act was committed for the benefit of a gang is "not tantamount to an opinion of guilt or, in this case, that the enhancement allegation was true, for there were other elements to the allegation that ha[ve] to be proved." (*People v. Valdez, supra*, 58 Cal.App.4th at p. 509.) Finally, Ballesteros did not offer an opinion on Millsap's subjective knowledge or intent. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658-659 [expert may not opine about individuals' knowledge or intent based on inferences from incidents to which the defendant was not connected].)

B. Sufficiency of the Evidence to Support the Gang Enhancement Allegation

Millsap claims that the "only evidence" that Millsap shot Cooper for the benefit of a gang or with the intent to promote gang activity was that the two men belonged to different gangs and that the shooting occurred in the territory of Cooper's gang. He contends that the evidence was therefore insufficient to establish that he committed the murder for the benefit of, at the direction of, or in association with a gang and with the specific intent to promote, further, or assist in criminal activities by gang members. As discussed in section I, *ante*, when the sufficiency of the evidence is challenged on appeal, we review the jury's finding for substantial evidence. (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.)

Millsap's argument disregards Ballesteros's expert testimony concerning the benefits to a gang and its members from shootings such as this. His opinion testimony, in conjunction with the other gang-related evidence, was sufficient for the jury to conclude that Millsap shot Cooper for the Broadways' benefit and with the intent to promote the gang's criminal conduct. (See, e.g., *Gardeley, supra*, 14 Cal.4th at p. 619 [from expert testimony that assault was classic gang activity that intimidates residents and cements a gang's stronghold on an area, a jury could reasonably conclude that the charged offense

was committed for the benefit of a gang and with the intent of promoting its criminal activities under § 186.22, subd. (b)(1)].)

III. Sentence Enhancement Under Section 12022.53, Subdivision (d)

Millsap argues that the imposition of a sentence enhancement for his personal and intentional discharge of a firearm, causing death (§ 12022.53, subd. (d)), violates section 654 and the merger doctrine because both the murder sentence and the enhancement punish him for the same act.

The merger doctrine precludes felony-murder convictions based on the predicate felony of assault. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) The doctrine does not apply to sentence enhancements and does not bar the imposition of an enhancement under section 12022.53, subdivision (d) when a defendant is convicted of first degree murder. (*People v. Sanders* (2003) 111 Cal.App.4th 1371, 1374-1375.)

Section 654 does not preclude the imposition of a single firearms enhancement to an offense committed by the use of firearms unless firearms use is an element of the offense when considered in the abstract. (*People v. Sanders, supra*, 111 Cal.App.4th at pp. 1375-1376; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314-1315; *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529-1534; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1156-1159.) Because firearms use is not an element of murder — although this specific case did involve the use of a firearm — the enhancement under section 12022.53, subdivision (d) does not violate section 654.

IV. Sentence Enhancement Under Section 186.22, Subdivision (b)(1)

At the time of Millsap's offense, section 186.22, subdivision (b)(1) provided for an additional determinate term of imprisonment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any

criminal street gang,” “[e]xcept as provided in paragraph (4) and (5).” Paragraph (5) provided that “any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served.” (§ 186.22, subd. (b)(5).)

Under the statute, where section 186.22, subdivision (b)(1) applies, the additional term must be “in addition and consecutive to” the punishment prescribed for the underlying felony; in this case, the additional term would be 10 years. (§ 186.22, former subd. (b)(1), now subd. (b)(1)(C).) The trial court’s ruling that the enhancement run concurrent appears to reflect a determination that “50 years to life is sufficient for this defendant.” To the extent the court intended to invoke the provisions of section 186.22, subdivision (g), to strike the additional punishment for the enhancement, however, further findings on the record were required, but were not made.

If the court did not intend to invoke section 186.22, subdivision (g), the court must address the issue of whether subdivision (b)(1) applies. By the statute’s own terms, a defendant convicted of a felony committed for the benefit of a criminal street gang and punishable by life imprisonment may not be subject to both the minimum parole eligibility period set forth in section 186.22, subdivision (b)(5) and the determinate sentence enhancement under section 186.22, subdivision (b)(1).³ (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486; *People v. Harper* (2003) 109 Cal.App.4th 520, 523-527; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236-1239; *People v. Herrera* (2001) 88 Cal.App.4th 1353.

³ The Supreme Court has recently granted review on this issue. (*People v. Lopez*, review granted Nov. 12, 2003, S119294; see also *People v. Montes* (2003) 31 Cal.4th 350, 363, fn 14, mod. 31 Cal.4th 744a [“We are mindful that there is a conflict in the Courts of Appeal on the proper application of section 186.22[, subdivision] (b)(5) when the underlying felony itself provides for a term of 15 years to life, 25 years to life, or life without the possibility of parole. [Citations.] As that issue is not before us, we express no opinion on the matter”].)

DISPOSITION

The four-year concurrent term imposed pursuant to section 186.22, subdivision (b)(1) is ordered stricken. The case is remanded for further findings consistent with section 186.22, subdivision (g) or imposition of either a consecutive term of 10 years under subdivision (b)(1)(C) or a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed.

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ZELON, J.

We concur:

PERLUSS, P.J.

WOODS, J.